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August 10, 2006

RECEIVED

AUG 11 2006

PUBLIC SERVICE
COMMISSION

Ms. Beth O'Donnell
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, KY 40601

Re: Covad's Petition for Arbitration for Interconnection Agreement
with BellSouth – Maine Federal District Court Confirms Line
Sharing is a Section 271 Checklist Item and Upholds State
Commission Authority to Set Rates
KPSC No. 2004-00259

Dear Ms. O'Donnell:

On July 24, 2006, Covad filed with the Commission a copy of an Order entered July 18, 2006 by a Federal District Court upon review of an Order of the Maine Public Utilities Commission. *Verizon-New England, Inc. d/b/a Verizon Maine v. Maine Public Utilities Commission*, Civil No. 05-53-B-C, Order Granting Defendant's Motion For Summary Judgment and Denying Plaintiff's Motion for Summary Judgment or, Alternatively, For Judgment On the Pleadings) (D. Me. 2006) ("Maine Order"). Covad submitted this Order under cover of a letter that purports to discuss the significance of this decision and its bearing on the § 271 line sharing issues pending in the above-captioned arbitration between Covad and BellSouth.

Covad has dramatically overstated the significance of this Order, and has further requested this Commission to utilize the Order in a way that is inconsistent with the Commission's prior Order in this proceeding. Specifically, Covad begins its letter by stating the following:

For more than eighteen months, the Commission has awaited federal clarification of the meaning of 'local loop transmission' under the 1996 Telecommunications Act. That clarification, which

is essential for the Commission to determine the legal obligation central to this case, most assuredly exists now. Covad requests that the Commission take administrative notice of the enclosed decision and promptly find that BellSouth has a continuing obligation to provide line sharing to Covad.¹

Thus, Covad presents the decision of the federal court in Maine as providing this Commission with the "federal clarification" that it has been awaiting for almost two years now. A review of this Commission's Order, which memorializes the decision to wait for further clarification, however, reveals that this is not the case.

In its Motion for Reconsideration, Covad responded to this Commission's decision that line sharing is not a § 271 obligation by urging the Commission "to reverse course and wait for clarity from the FCC."² The Commission granted this request and held that "these matters shall be held in abeyance pending appropriate clarification and guidance from the FCC as to BellSouth's continuing obligation to provide line sharing."³ The Commission went on to state that if clarification and guidance were not provided by the FCC within three months, then "the Commission shall review this matter again at the request of either party."⁴ Giving Covad the benefit of considerable doubt, Covad appears to have forgotten both what it requested and what the Commission ordered. Nevertheless, it is obvious that this Commission never stated that it would simply follow the lead of the first federal district court anywhere in the country to issue a ruling on line sharing. To the contrary, the Commission stated that it would await guidance from the FCC. To the extent that this guidance has still not been forthcoming, the Commission would certainly be justified in continuing to await this clarification.⁵

At any rate, the Commission should decline to accept Covad's invitation to rely solely on a single, isolated decision of a federal district court in Maine. This is especially true considering that the Maine Order is already the subject of an appeal to the First Circuit.⁶ Further, the Maine Order is not binding on this Commission, and this Order is so weakened by faulty logic that, judged on its

¹ Covad Letter, p. 1 (emphasis added).

² Covad Motion for Reconsideration, p. 3. (emphasis added).

³ Order, issued November 30, 2004, p. 2. (emphasis added).

⁴ Id.

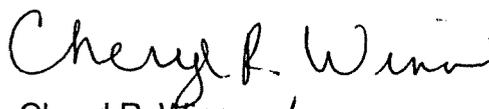
⁵ If the Commission chooses to take this route, then it would certainly not harm Covad in any way, since the Commission has ordered BellSouth to provide line sharing on an interim basis pending its final resolution of this matter.

⁶ See Docket Sheet, First Circuit Court of Appeals, attached hereto as Attachment 1.

merits, it simply cannot be viewed as persuasive.⁷ At the same time, the Maine Order conflicts with the rulings of state commissions in numerous other states, such as Florida, Tennessee, Illinois, Massachusetts, Michigan, and Rhode Island which have all held that line sharing is not an obligation under § 271.⁸

Accordingly, this isolated (and unpersuasive) decision from a federal district court in Maine does not provide this Commission with any meaningful clarification on the line sharing issue. Despite Covad's assertions to the contrary, it cannot take the place of clarification from the FCC.

Respectfully submitted,


Cheryl R. Winn 

Attachments

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⁷ Counsel for Covad has also filed the Maine Order on behalf of Covad and the other members of CompSouth in Case No. 2004-00427, albeit as ostensible authority on points other than those raised by Covad in its letter to the Commission. Attached hereto as "Attachment 2" is BellSouth's letter in response to this filing, which points out some of the many infirmities of the Maine Order.

⁸ See Order on Generic Proceeding, *Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.*, Docket No. 041269-TP, Order No. PSC-06-0172-FOF-TP, at 52 (Fla. PSC Mar. 2, 2006); Order, *Petition of DIECA Communications, Inc. d/b/a Covad Communications Co.*, Docket No. 04-00186, at 5-7 (Tenn. Reg. Auth. July 20, 2005) (rejecting argument that § 271 requires line sharing, and amending interconnection agreement to reflect that conclusion); Arbitration Decision, *XO Illinois, Inc.*, No. 04-0371, 2004 WL 3050537, at *59 (Ill. Commerce Comm'n Oct. 28, 2004) ("HFPL is not a 271 checklist item"); Arbitration Order, *Petition for Verizon New England, Inc.*, D.T.E. 04-33, at 185 (Mass. D.T.E. July 14, 2005) (ordering parties to amend interconnection agreements to reflect that line sharing is not required); Order, *Application of ACD Telecom, Inc.*, No. U-14382, 2005 Mich. PSC LEXIS 109, at *12-*13 (Mich. PSC Mar. 29, 2005) (dismissing complaint that BOC violated interconnection agreement by refusing line sharing, because § 271 does not require line sharing); Report and Order, *Verizon-Rhode Island's Filing of October 2, 2003*, Docket No. 3556, 2004 R.I. PUC LEXIS 31, at *16-*17 (R.I. Pub. Utils. Comm'n Oct. 12, 2004) (revising tariff not to require line sharing).

General Docket
US Court of Appeals for the First Circuit

Court of Appeals Docket #: 06-2151
8/7/06

Filed:

Nsuit: 3890 Other Statutory Actions
Verizon New England v. ME Public Utilities, et al
Appeal from: U.S. District Court of ME

Lower court information:

District: 0100-1 : 05-00053 lead: 05-00053
Ordering Judge: Gene Carter, Judge
trial judge: Margaret J. Kravchuk, Magistrate Judge
trial judge: George Z. Singal, Chief Judge
trial judge: John A. Woodcock, Jr., Judge
court reporter: Pauline D. Terry, Court Reporter
court reporter: Dennis Ford, Court Reporter
Date Filed: 4/1/05
Date order/judgment: 7/18/06
Date NOA filed: 7/19/06
District: 0100-1 : 05-00053 lead: 05-00053
Date Filed: 4/1/05
Date order/judgment: 7/19/06
Date NOA filed: 7/19/06

Fee status: paid

Prior cases:

None

Current cases:

None

Panel Assignment:

Docket as of August 7, 2006 11:56 pm

Page 1

06-2151 Verizon New England v. ME Public Utilities, et al

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Andrew S. Hagler

Docket as of August 7, 2006 11:56 pm

Page 2

06-2151 Verizon New England v. ME Public Utilities, et al

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Defendant - Appellee

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Trina M. Bragdon
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06-2151 Verizon New England v. ME Public Utilities, et al

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06-2151 Verizon New England v. ME Public Utilities, et al

VERIZON NEW ENGLAND, INC., d/b/a Verizon Maine

Plaintiff - Appellant

v.

MAINE PUBLIC UTILITIES COMMISSION; STEPHEN L. DIAMOND, in his official capacity as Commissioner of the Maine Public Utilities Commission; SHARON M. REISHUS, in her official capacity as Commissioner of the Maine Public Utilities Commission; KURT W. ADAMS, in his official capacity as Commissioner of the Maine Public Utilities Commission

Defendants - Appellees

06-2151 Verizon New England v. ME Public Utilities, et al

8/7/06
Appeal
form due
CIVIL CASE docketed. Opening forms sent. Notice of
filed by Appellant Verizon New England. Appearance
8/21/06. Docketing Statement due 8/21/06. Transcript
Report/Order due 8/21/06. [06-2151] (laur)

8/7/06
Clerk's
certificate. Transcript filed by Pauline D. Terry.
[1152742-1] [06-2151] (laur)

8/7/06
filed
Transcript of 10/25/05 Preliminary Injunction Hearing
by court reporter Pauline D. Terry. [06-2151] (laur)

8/7/06
Involvement of attorney Mark E. Porada for Verizon New
England terminated. [06-2151] (laur)

PACER Service Center

Transaction Receipt

August 10, 2006

Ms. Beth O'Donnell
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Re: Petition To Establish Docket To Consider Amendments To
Interconnection Agreements Resulting From Changes of Law
KPSC No. 2004-00427

Dear Ms. O'Donnell:

On July 27, 2006, the Competitive Carriers of the South, Inc. ("CompSouth") filed with the Commission a copy of an Order entered July 18, 2006 by a Federal District Court upon review of an Order by the Maine Public Utilities Commission, *Verizon New England, Inc. v. Maine Public Utilities Commission*, Civil No. 05-53-B-C, (Order Granting Defendant's Motion For Summary Judgment and Denying Plaintiff's Motion for Summary Judgment Or, Alternatively, For Judgment On The Pleadings) (D. Me. 2006) ("Maine Order"). In its letter, CompSouth requested that the Commission take notice of this decision, and contended that it is significant to the resolution of the issues in the above-identified case (i.e., the change of law proceeding). Specifically, CompSouth states that the Maine Order is "significant to the issues pending before the Kentucky Commission as it addresses the selfsame arguments offered here by BellSouth."¹ CompSouth's letter, however, does not provide an accurate representation of the actual ruling of the federal court or of the significance (or lack thereof) of that case to the issues currently under consideration by the Kentucky Commission. Viewed properly, the above-described federal court Order amounts to a ruling that is unpersuasive, and that turns upon different arguments than those presented by the parties herein. Furthermore, that decision has been appealed by Verizon.²

CompSouth maintains that the Maine Order includes decisions on two critical points:

¹ CompSouth Letter, p. 2.

² See Docket Sheet, First Circuit Court of Appeals, attached hereto as Attachment 1.

[1] [T]he Court has definitively concluded that, as a matter of law, a state public service commission possesses the jurisdiction to set rates for unbundled network elements required by Section 271 of the Telecommunications Act of 1996. [2] The court also specifically concluded that Federal law does not preempt a state commission requirement that elements required by Section 271 be provided at TELRIC rates pending approval of permanent rates for those elements.³

CompSouth neglects, however, to mention the basis of the Court's ruling.

In the Maine Order, the Court acknowledged the position of Verizon that whether a Public Service Commission can lawfully set rates for elements required by 271 depends on whether "Congress conferred on state commissions the authority to regulate and enforce the Section 271 obligations."⁴ The Court disagreed with this assessment, however, and noted that the State of Maine has granted the Maine PUC broad authority to make services available on rates that are just and reasonable.⁵ Based on this conclusion, the Maine Order states that Verizon could only successfully challenge this exercise of state-delegated authority by demonstrating that this authority has been preempted by Federal law. As the Court noted, "Verizon failed to make the argument in its Motion for Summary Judgment."⁶ The Court then went on to consider TELRIC rates specifically, and found that "on this issue, Verizon presents no new facts and makes no additional arguments to those it offered in seeking preliminary injunctive relief."⁷

Thus, the Maine Order is not a sweeping declaration that federal law does not preempt state law on matters related to 271. Instead, the Court simply found that Verizon failed to make the preemption argument that the federal court believed to be necessary to prevail on this point. The more important point, however, is that the federal court did not decide that the Maine PUC had been delegated federal authority to interpret the Act, but rather that it could set rates for § 271 offerings under state-delegated authority.

This Maine Order is, of course, not binding on this Commission. Rather the Commission may adopt the approach of the federal court in Maine, or not, depending on whether it finds the logic of the Maine Order to be persuasive. BellSouth submits that this Commission should decline to rule as the Maine Court did for three reasons, each

³ CompSouth Letter, p. 1.

⁴ Maine Order, p. 6.

⁵ Id.

⁶ Maine Opinion, p. 6. The Court did note in dictum that Verizon presented a preemption argument in support of its request for preliminary injunctive relief, and that the Court did not believe that a preemption argument would have been successful even if Verizon had made this argument in its Motion for Summary Judgment.

⁷ Id.

of which is independently compelling: (1) the Maine Order is patently illogical; (2) it is contrary to the overwhelming weight of authority and (3) it turns on a point of law that is not only not before this Commission, but that CompSouth expressly decided not to rely upon.

First, although the court asserted that states can set rates for purposes of § 271, it cited no federal law granting such authority. Instead, the court concluded that state law grants the authority to set rates for purposes of § 271. However, § 271 is a provision of federal law, and states have no presumed or inherent authority to implement federal law. As the Eighth Circuit has explained, “[t]he new regime [under the 1996 Act] for regulating competition in this industry is federal in nature . . . and while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state, law.” (*Southwestern Bell Telco v. Connecticut Communications Corp.*, 225 F. 3d. 942, 947 (8th Cir. 2000) (emphasis added)). The contrary conclusion in the Maine Order, that state authority can confer the power to interpret or implement federal law, is both legally unsupported and illogical.

Second, federal law is clear that implementation of § 271 is a task delegated to the FCC, not to State Commissions. Consistent with the plain language of § 271, courts have concluded that “it is the prerogative of the FCC . . . to address any alleged failure by [a BOC] to satisfy any statutorily imposed conditions to its continued provision of long distance service” and, accordingly, that § 271 does *not* authorize state commissions to impose unbundling obligations. *BellSouth v. Mississippi PSC*, 368 F. Supp. 2d at 566; accord *BellSouth Telecomms., Inc. v. Cingery Communications Co.*, No. 03:05-CV-16-JMH, slip op. at 12 (E.D. Ky. Apr. 22, 2005) (“The enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first.”) As the Seventh Circuit has put it, the 1996 “Act reserves to the FCC the authority to decide whether to grant a section 271 application.” *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm’n*, 359 F.3d 493, 495 (7th Cir. 2004).

To date, twenty-seven State commissions have reached the same conclusion. Commissions in Alabama, Arkansas, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Montana, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Washington, and the District of Columbia have all agreed that they do not have authority to implement § 271 obligations. In contrast, only ten State Commissions (including Maine) have reached the contrary result.⁸

Third, CompSouth asserts that the decision of the federal court in Maine addresses a central issue in this case, i.e., whether state Commission’s rate-making authority under State law allows it to set rates for § 271 offerings.⁹ In reality,

⁸ See “Attachment 2” hereto for a listing of all 37 states that have ruled on this issue and a description of those rulings.

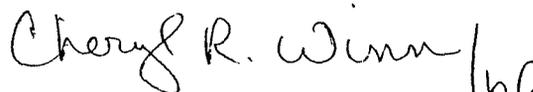
⁹ CompSouth Letter, p. 2.

CompSouth specifically declined to make this an issue in the change of law proceeding. The argument that CompSouth did make in this case is that "the terms and conditions for the checklist items in 271 must be in an approved interconnection agreement."¹⁰ CompSouth also argued that under the federal statutory scheme, "the interconnection agreements incorporating Section 271 checklist items are subject to the Section 252 state commission arbitration process if the parties do not reach agreement, as well as subject to state commission review and approval if negotiated by the parties."¹¹ If there is any doubt that CompSouth's argument in the instant proceeding is based on its interpretation of federal law, and not on state-delegated ratemaking authority, then this doubt is dispelled by a clear declaration in CompSouth's Post-Hearing Brief: "CompSouth also contends that the Commission may include network elements in ICAs pursuant to state law authority, but it is not requesting that the Commission exercise such authority in this proceeding."¹² At the same time, CompSouth does not claim (nor can it) that the Maine Order supports, or even comments upon, the legal theory that CompSouth actually did advance in this proceeding.

Viewed accurately, the Maine Order is nothing more than a non-binding and unpersuasive decision to uphold the Maine PUC's unique interpretation of the parameters of state law. This Order does not even address the legal arguments upon which CompSouth relies in the change of law proceeding, and it has no significance to this proceeding. BellSouth respectfully submits that if this Commission seeks guidance from the rulings of other tribunals, then the better course of action would be to follow the lead of the twenty-seven State Commissions that have interpreted the Act not to empower state Commissions to implement § 271.

One paper copy of this filing is provided for filing in case 2004-00427. The attached certification for case 2004-00427 certifies that this filing was filed electronically today and served by email on parties of record. Parties of record can access the information at the Commission's Electronic Filing center located at <http://psc.ky.gov/efs/efsmain.aspx>.

Respectfully submitted,



Cheryl R. Winn

Attachments

cc: Parties of Record
645258

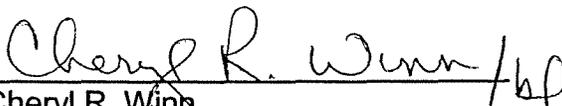
¹⁰ CompSouth's Post Hearing Brief, p. 30.

¹¹ Id.

¹² Id., p. 25 (emphasis added).

CERTIFICATION FOR 2004-00427

I hereby certify that the electronic version of this filing made with the Commission this 21st day of April 2006 is a true and accurate copy of the documents filed herewith in paper form on April 21, 2006, and the electronic version of the filing has been transmitted to the Commission. An electronic copy of the Read1st document has been served electronically on parties.


Cheryl R. Winn

ELECTRONIC SERVICE LIST - KPSC 2004-00427

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General Docket
US Court of Appeals for the First Circuit

Court of Appeals Docket # 06-2151
8/7/06

Filed:

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Verizon New England v. ME Public Utilities, et al
Appeal from: U.S. District Court of ME

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Ordering Judge: Gene Carter, Judge
trial judge: Margaret J. Kravchuk, Magistrate Judge
trial judge: George Z. Singal, Chief Judge
trial judge: John A. Woodcock, Jr., Judge
court reporter: Pauline D. Terry, Court Reporter
court reporter: Dennis Ford, Court Reporter
Date Filed: 4/1/05
Date order/judgment: 7/18/06
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Date order/judgment: 7/19/06
Date NOA filed: 7/19/06

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None

Current cases:

None

Panel Assignment:

Docket as of August 7, 2006 11:56 pm

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06-2151 Verizon New England v. ME Public Utilities, et al

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Plaintiff - Appellant

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Docket as of August 7, 2006 11:56 pm

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06-2151 Verizon New England v. ME Public Utilities, et al

official capacity as
Commissioner of the Maine
Public Utilities Commission
Defendant - Appellee

(See above)
[NTC st]

Trina M. Bragdon
(See above)
[NTC st]

SHARON M REISHUS, In her
official capacity as
Commissioner of the Maine
Public Utilities Commission
Defendant - Appellee

Andrew S. Hagler
(See above)
[NTC st]

Trina M. Bragdon
(See above)
[NTC st]

KURT W. ADAMS, In his official
capacity as Commissioner of
the Maine Public Utilities
Commission
Defendant - Appellee

Andrew S. Hagler
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06-2151 Verizon New England v. ME Public Utilities, et al

VERIZON NEW ENGLAND, INC., d/b/a Verizon Maine

Plaintiff - Appellant

v.

MAINE PUBLIC UTILITIES COMMISSION; STEPHEN L. DIAMOND, in his official capacity as Commissioner of the Maine Public Utilities Commission; SHARON M. REISHUS, in her official capacity as Commissioner of the Maine Public Utilities Commission; KURT W. ADAMS, in his official capacity as Commissioner of the Maine Public Utilities Commission

Defendants - Appellees

06-2151 Verizon New England v. ME Public Utilities, et al

8/7/06 CIVIL CASE docketed. Opening forms sent. Notice of Appeal filed by Appellant Verizon New England. Appearance form due 8/21/06. Docketing Statement due 8/21/06. Transcript Report/Order due 8/21/06. [06-2151] (laur)

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8/7/06 Transcript of 10/25/05 Preliminary Injunction Hearing filed by court reporter Pauline D. Terry. [06-2151] (laur)

8/7/06 Involvement of attorney Mark E. Porada for Verizon New England terminated. [06-2151] (laur)

PACER Service Center

Transaction Receipt

State Commission Decisions Rejecting Claim of Authority to Implement Section 271

- Alabama: Order Dissolving Temporary Standstill, *Competitive Carriers of the South, Inc.*, Docket 29393, 2005 Ala. PUC LEXIS 126, at *42-*43 (Ala. PUC May 25, 2005) (“With regard to MCI’s argument that BellSouth has an independent obligation to provision UNE-P switching pursuant to § 271 of the Telecommunications Act of 1996, we conclude, as did the court in *Mississippi PSC*, that given the FCC’s decision ‘to not require BOCs to combine § 271 elements no longer required to be unbundled under § 251, it [is] clear that there is no federal right to § 271 based UNE-P arrangements.’ This conclusion is further bolstered by the fact that the ultimate enforcement authority with respect to a regional Bell operating company’s alleged failure to meet the continuing requirements of § 271 of the Telecommunications Act of 1996 rests with the FCC and not this Commission. MCI’s argument that there is an independent obligation under § 271 to provide UNE-P is accordingly rejected.”).
- Arkansas: Memorandum Opinion and Order, *Petition of Southwestern Bell Telephone, L.P. d/b/a SBC Arkansas for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Arkansas 271 Agreement (“A2A”)*, Docket No. 05-081-U, 2005 Ark. PUC LEXIS 432, at *3-*4 (Ark. PSC Oct. 31, 2005) (“ICA arbitrations are limited to establishing the rates, terms and conditions to implement the obligations of 47 USC § 251. This Commission’s obligations under Section 271 of the Act are merely advisory to the FCC. . . . Although SBC should provide the items specified in Section 271 and the TRO, this Commission has no jurisdiction to enforce Section 271.”).
- Delaware: Arbitration Award, *Petition of Dieca Communications Inc. et al for an Amendment to Interconnection Agreements with Verizon Delaware Inc., Pursuant to Section 252(b) of the Communications Act of 1934, as amended, the Triennial Review Order and the Triennial Review Remand Order*, Docket Nos. 05-164 & 04-68, at 111-12 (Del. PSC Mar. 24, 2006) (“This arbitration proceeding involves the ICAs changes necessary to implement changes in Verizon’s obligations resulting from the TRO and TRRO. For the most part, these changed obligations are subject to the provisions of § 251 of the Act. Furthermore, there is no clear indication in either the TRO or TRRO that the FCC expected the states to address any issues beyond that scope, such as potential § 271 obligations, as part of the subsequent § 252 process. As a result, it is not necessary to address the questions of state authority over § 271 matters in order to resolve the matters that are within the basic scope of the present arbitration proceeding. Therefore, the ICAs should not include anything related to any claimed § 271 entitlements.”), available at <http://www.state.de.us/delpsc/dockets/0468award.pdf>.

- Florida: Order on Generic Proceeding, *Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.*, Docket No. 041269-TP, Order No. PSC-06-0172-FOF-TP, at 52 (Fla. PSC Mar. 2, 2006) (“Upon thorough analysis of FCC orders, the Act, case law, and the record in this proceeding, we find that this Commission does not have authority to require BellSouth to include in § 252 interconnection agreements § 271 elements. We acknowledge that this is a complex issue, the resolution of which is burdened by the lack of a clear declaration by the FCC and the existence of a significant, yet inconsistent body of law. However, we find that the regulatory framework set forth by the FCC in both the *TRO* and the *TRRO* leads reasonably to the conclusion that jurisdiction over § 271 matters lies with the FCC rather than this Commission.”), available at <http://www.floridapsc.com/library/FILINGS/06/01842-06/01842-06.PDF>.
- Idaho: Order No. 29825, *Petition of Dieca Communications, Inc., d/b/a Covad Communications Co. for Arbitration of an Interconnection Agreement with Qwest Corp.*, Case No. CVD-T-05-1, 2005 Ida. PUC LEXIS 139, at *9 (Idaho PUC July 18, 2005) (“We conclude that the Commission does not have authority under Section 251 or Section 271 of the Act to order the Section 271 unbundling obligations as part of an interconnection agreement.”).
- Illinois: Arbitration Decision, *Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 with Illinois Bell Telephone Company to Amend Existing Interconnection Agreements to Incorporate the Triennial Review Order and the Triennial Review Remand Order*, Docket 05-0442, at 60 (Ill. Commerce Comm’n Sept. 15, 2005) (“We note that the Commission has no jurisdiction to enforce the provisions of Section 271 absent an agreement. General jurisdiction would lie only with the FCC. . . . The Commission rejects CLECs’ proposal to update underlying agreements requiring SBC to provide new rates, terms, and conditions for Section 271 elements, apart from any terms agreed to in the underlying agreement.”). *But see XO Illinois Petition for Arbitration of an Amendment to an Interconnection agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended*, Docket No. 04-0471, Amendatory Arbitration Decision, at 66-67 (Ill. Commerce Comm. Oct. 28, 2004); *Cbeyond Communications et al. v. Illinois Bell Telephone Company*, Case No. 05-0154, Order, at 24-27 (Ill. C.C. June 2, 2005).
- Indiana: Order, *Indiana Utility Regulatory Commission’s Investigation of Issues Related to the Implementation of the Federal Communication Commission’s Triennial Review Remand Order and the Remaining Portions of the Triennial Review Order*, Cause No. 42857, at 35 (Indiana URC Jan. 11, 2006) (joined “the many courts and commissions that have already held that Section 271 obligations have no place in Section 251/252 interconnection agreement[s] and that state commissions have no jurisdiction to enforce or determine the requirements of Section 271.”), available at http://www.in.gov/iurc/portal/Modules/Ecms/Cases/Docketed_Cases/ViewDocument.aspx?DocID=0900b631800a6212.

- Iowa: Arbitration Order, *Arbitration of Dieca Communications, Inc., d/b/a Covad Communications Co. v. Qwest Corp.*, Docket No. ARB-05-1, 2005 Iowa PUC LEXIS 186, at *10 (Iowa Util. Bd., May 24, 2005) (“Clearly, the provisions that are at issue in this arbitration are unbundling obligations pursuant to § 271, rather than § 251 obligations. Therefore, the Board lacks jurisdiction or authority to require that Qwest include these elements in an interconnection agreement arbitration brought pursuant to § 252.”).
- Kansas: Order No. 13: Commission Order on Phase I, *Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P d/b/a SBC Kansas Under Section 252(b)(1) of the Telecommunications Act of 1996*, Docket No. 05-BTKT-365-ARB, at 2 (KCC May 16, 2005) (“Where a checklist item is no longer subject to section 251 unbundling, section 252(d)(1) does not operate as the pricing standard. Rather, the pricing of such items is governed by the ‘just and reasonable’ standard established under sections 201 and 202,” which “provide no authority to state commissions to establish prices for services required to be provided pursuant to section 271.”).
- Louisiana: Order U-28131 Consolidated With Order U-28356, *In re: Petition to establish generic docket to consider amendments to Interconnection Agreements resulting from changes of law*, Docket Number U-28356, at 3 (Louisiana PSC Feb. 22, 2006) (“The Commission declines to order BellSouth to include Section 271 elements in Section 252 agreements and further declines to set rates for Section 271 elements.”), available by searching for order number at <http://204.196.11.47/Workplace/Search.jsp>.
- Maryland: Order No. 79893, *Petition of AT&T Communications of Maryland, Inc. and TCG Maryland for an Order Preserving Local Exchange Market Stability*, Case No. 9026, at 8 (Md. PSC Apr. 8, 2005) (“With respect to whether Section 271 provides an independent basis for continued provisioning of switching . . . at TELRIC rates, the Commission notes that Verizon’s fulfillment of its Section 271 obligations do not necessitate the provision of Section 251 elements at Section 251 rates.”).
- Massachusetts: Consolidated Order Dismissing Triennial Review Order Investigation and Vacating Suspension of Tariff M.D.T.E. No. 17, *Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission’s Triennial Review Order Regarding Switching for Mass Market Customers*, D.T.E. 03-60, at 55-56 (Mass. D.T.E. Dec. 15, 2004) (Section 271 elements “should be priced, not according to TELRIC, but rather according to the ‘just and reasonable’ rate standard of Sections 201 and 202 of the Act. . . . [T]he FCC has the authority to determine what constitutes a ‘just and reasonable’ rate under Section 271, and the FCC is the proper forum for enforcing Verizon’s Section 271 unbundling obligations. . . . [W]e do not have authority to determine whether Verizon is complying with its obligations under Section 271.”).

- Montana: Final Order, *Petition of Dieca Communications, Inc., d/b/a Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation*, Docket No. D2005.4.51, Order No. 6647a, 2006 Mont. PUC LEXIS 11, at *4-*7 (Mont. PSC Jan. 8, 2006) (“Although § 271 makes passing references to certain provisions of §§ 251 and 252, there is no indication that § 271 was intended to be part of the §§ 251/252 arbitration regime. . . . Covad is effectively precluded from using a § 252 arbitration to obtain an unbundling of § 271 network elements . . . [T]o the extent that Qwest has not fulfilled this [§ 271] obligation, Covad may pursue its administrative remedies with the FCC.”), available at http://www.psc.state.mt.us/eDocs/DocketsAndOrders/D2005-4-51_6647a.pdf.
- New Jersey: Telecommunications Order, *Petition of Verizon New Jersey Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers in New Jersey Pursuant to Section 252 of the Communications Act of 1934, as Amended, the Triennial Review Order and the Triennial Review Remand Order*, Docket No. TO05050418, at 14 (New Jersey BPU Mar. 16, 2006) (“The Board declines to require separate unbundling under sections 251, 252 and 271 of the Act, . . . and disagrees with the need to institute any additional rate review proceedings at this time.”), available at http://www.nj.gov/bpu/wwwroot/telco/TO05050418_20060327.pdf.
- North Carolina: Order Concerning Changes of Law, *Proceeding to Consider Amendments to Interconnection Agreements Between BellSouth Telecommunications, Inc. and Competing Local Providers Due to Changes of Law*, Docket No. P-55, SUB 1549, at 86 (North Carolina Util. Comm’n Mar. 1, 2006) (“The Commission after careful consideration concludes that the Commission lacks the authority to compel BellSouth to include Section 271 UNEs in its Section 251/252 ICAs, nor does the Commission believe it has the authority to establish rates for such elements.”), available at <http://ncuc.commerce.state.nc.us/cgi-bin/webview/senddoc.pgm?dispfmt=&itype=Q&authorization=&parm2=MBAAAA06060B>.
- North Dakota: Order, *Dieca Communications, Inc. Interconnection Arbitration*, Case No. PU-05-165, 2006 N.D. PUC LEXIS 3, at *22-*23 (ND PUC Feb. 8, 2006) (“We find that we do not have the authority under the Act to impose unbundling obligations under Section 271. The FCC has the exclusive authority to determine whether Qwest has complied with the substantive provisions of Section 271 including the checklist provisions. Enforcement of Section 271 requirements is also clearly under the exclusive jurisdiction of the FCC. State commissions have only a consulting role under the Act.”).

- Ohio: Arbitration Award, *Establishment of Terms and Conditions of an Interconnection Agreement Amendment Pursuant to the Federal Communications Commission's Triennial Review Order and its Order on Remand*, Case No. 05-887-TP-UNC, at 27 (Ohio PUC Nov. 9, 2005) (rejecting CLEC arguments that "they are entitled to purchase § 271 checklist items pursuant to § 252 agreements," and holding that "these obligations should be addressed in the context of carrier-to-carrier agreements, and not § 252 interconnection agreements, inasmuch as the components will not be purchased as network elements").
- Oregon: Order Adopting Arbitrator's Decision, *Covad Communications Co. Petition for Arbitration of an Interconnection Agreement with Qwest Corp.*, ARB 584, 2005 Ore. PUC LEXIS 445, at *36 (Ore. PUC Sept. 6, 2005) ("Every state within the Qwest operating region that has examined this issue has done so in a thoughtful, thorough and well-reasoned manner. In each case, the agency with the authority to review the Covad/Qwest ICA dispute has found that there is no legal authority requiring the inclusion of Section 271 UNEs in an interconnection agreement subject to arbitration under Section 251 of the Act, and I adopt the legal conclusions that they all hold in common.").
- Pennsylvania: Opinion and Order, *Verizon Pennsylvania Inc. Tariff No. 216 Revisions*, Docket No. P-00042092, 2005 Pa. PUC LEXIS 9, at *42 (Pa. PUC June 2, 2005) ("We believe that the enforcement responsibilities of Section 271 compliance lies with the FCC. Therefore, the Commission will not oblige Verizon PA to produce tariff amendments that reflect its Section 271 obligations. However, the Commission will continue to monitor Verizon PA's compliance with its Section 271 obligations and, if necessary, initiate appropriate complaint proceedings before the FCC.").
- Rhode Island: Report and Order, *Verizon-Rhode Island's Filing of February 18, 2005 to Amend Tariff No. 18*, Docket No. 3662, 2005 R.I. PUC LEXIS 26, at *15-*16 (R.I. PUC July 28, 2005) ("The FCC has not clearly indicated what role, if any, a state utility commission plays in the Section 271 process other than providing a consultation to the FCC on a Bell Operating Company's ('BOC') initial application to enter the long distance market. In fact, the FCC recently indicated it has the authority to enforce Section 271. In addition, the FCC has clearly stated that it will undertake a 'fact-specific inquiry' as to whether a BOC's rates for Section 271 facilities are just and reasonable under Section 201 and 202. At this time, it is apparent to the Commission that at the bistro serving up the BOCs' wholesale obligations, the kitchen door numbered 271 is for 'federal employees only.'").

- South Carolina: Commission Directive, *Petition of BellSouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 2004-316-C (SC PSC Feb. 28, 2006) (Commission vote to accept following motion: “The first category of issues would be the 271-related issues: With regard to Issue 8 (a), I move that we adopt the BellSouth position, along with the proposed Office of Regulatory Staff reporting requirements. Disputes regarding 271 issues would be reported to both the Commission and ORS. Issues 8 (b) and 8 (c) would then be declared moot. I further move that we adopt BellSouth’s reasoning for Issues 14, 17, 18, and 22.”), *available at* <http://dms.psc.sc.gov/attachments/B6C82725-D7D8-9648-DE003D8F79E35898.pdf>.
- South Dakota: Arbitration Order, *Petition of DIECA Communications, Inc. D/B/A Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation*, Docket TC05-056, at 6 (South Dakota PUC July 26, 2005) (“With respect to the section 271 issue, the Commission finds that it does not have the authority to enforce section 271 requirements within this section 252 arbitration. . . . The language in [section 252] clearly anticipates that Section 252 arbitrations will concern section 251 requirements, not section 271 requirements.”), *available at* <http://www.state.sd.us/puc/commission/orders/telecom/2005/tc05-056ao.pdf>.
- Texas: Arbitration Award – Track II Issues, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Docket No. 28821, at 18-19 (Tex. PUC June 17, 2005) (holding that that the 1996 Act “provides no specific authorization for the Commission to arbitrate section 271 issues;” that “Section 271 only gives states a consulting role in the 271 application/approval process”; that a state commission “does not have direct oversight over section 271 network elements; and that and the “review of section 271 pricing” is limited to “proceedings at the FCC, as well”).
- Utah: Arbitration Report and Order, *Petition of DIECA Communications, Inc. d/b/a Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation*, Docket No. 04-2277-02, at 20-21 (Utah PSC Feb. 8, 2005), *available at* <http://www.psc.state.ut.us/telecom/05orders/Feb/04227702aro.htm> (“[W]e differ with Covad in its belief that we should therefore impose Section 271 and state law requirements in the context of a Section 252 arbitration. Section 252 was clearly intended to provide mechanisms for the parties to arrive at interconnection agreements governing access to the network elements required under Section 251. Neither Section 251 nor 252 refers in any way to Section 271 or state law requirements, and certainly neither section anticipates the addition of new Section 251 obligations via incorporation by reference to access obligations under Section 271 or state law.”).

- Vermont: Order, *Petition of Verizon New England, Inc., d/b/a/ Verizon Vermont, for Arbitration of an Amendment to Interconnection Agreements*, Docket No. 6932, at 247, 264 (Vermont PSC Feb. 27, 2006) (“As Verizon points out, enforcement of Section 271 obligations rests largely with the FCC. Thus, for issues related to whether Verizon still complies with a particular checklist item, recourse would be to the FCC. . . . However, to the extent that Verizon made specific commitments to the state of Vermont during the Section 271 process, and asked the state to rely upon those commitments, the Company’s agreement represents a binding arrangement enforceable by the Board.”), available at <http://www.state.vt.us/psb/orders/2006/files/6932fnl.pdf>.
- Washington: Arbitrator’s Report and Decision, *Petition for Arbitration of an Amendment to Interconnection Agreements of Verizon Northwest Inc.*, Docket No. UT-043013, Order No. 17, at 25 (Wash. U.T.C. July 8, 2005) (holding that, because “[t]he FCC has the exclusive authority to act under Section 271,” state commissions “ha[ve] no authority under Section 252 or Section 271 of the Act to require inclusion of Section 271 unbundling obligations in the parties’ interconnection agreements,” and “[a]n order requiring [such] inclusion . . . would conflict with the federal regulatory scheme”), *aff’d*, Final Order, *Petition for Arbitration of an Amendment to Interconnection Agreements of Verizon Northwest Inc.*, Docket No. UT-043013, Order No. 18 (Wash. UTC Sept. 22, 2005).
- Washington, D.C.: Order, *Petition of Verizon Washington, D.C. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996*, TAC-19, at 34 (D.C. PSC Dec 15, 2005) (“[T]hroughout the *TRO*, the FCC limits its discussion of the section 252 interconnection agreement process to apply to implementing section 251. The FCC has also determined that the section 271 unbundling obligations are independent of the unbundling obligations of section 251. Thus, there is no requirement that section 271 network elements be addressed in interconnection agreements negotiated and arbitrated pursuant to section 252.”), available at http://www.dcpsc.org/pdf_files/commorders/orderpdf/orderno_13836_TAC-19.pdf.

State Commission Decisions Accepting Claim of Authority to Implement Section 271

- Arizona: Opinion and Order, *Petition of Dieca Communications, Inc., dba Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corp.*, Docket No. T-03632A-04-0425, Decision No. 68440, at 20 (Arizona Corp. Comm'n Feb. 2, 2006) ("When read in conjunction with the entirety of the Telecom Act, the Section 271 obligations described above must be considered the type of interconnection and access requirements contemplated under Section 252. . . . We believe that our ongoing oversight and monitoring role may be exercised in any appropriate proceeding before the Commission, including this Section 252 arbitration matter"), available at <http://images.edocket.azcc.gov/docketpdf/0000040183.pdf>.
- Colorado: Order, *Qwest Corp. v. Public Util. Comm'n of Colorado*, No. 04-D-02596-WYD-MJW, 2006 WL 771223 (Colo. PUC. Mar. 24, 2006) (finding that a commercial agreement covering 271 elements (switching and shared transport) had to be filed with the state commission under § 252).
- Georgia: Order Initiating Hearings to Set a Just and Reasonable Rate Under Section 271, *Generic Proceeding to Examine Issues Related to BellSouth Telecommunications, Inc.'s Obligations to Provide Unbundled Network Elements*, Docket No. 19341-U, at 4 (Georgia PSC Jan. 17, 2006) ("[T]he Commission concludes that it is reasonable to assert jurisdiction to set just and reasonable rates for de-listed UNEs pursuant to Section 271 of the Federal Telecom Act."), available at <ftp://www.psc.state.ga.us/19341/89229.doc>.
- Missouri: Arbitration Order, *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A")*, Case No. TO-2005-0336, at 30 (Missouri PSC July 11, 2005) ("The Arbitrator's decision with respect to both CLEC Coalition Pricing Issues A-2 and A-3 was that 'The Arbitrator agrees that the ICA must include prices for § 271 UNEs.' However, the Arbitrator failed to specify what those rates would be. . . . [T]he Commission concurs that the Coalition's compromise position – rates patterned on the FCC's transition period rates for declassified UNEs – constitutes a suitable interim rate structure for § 271 UNEs."), available at <http://www.psc.mo.gov/orders/2005/07115336.htm>.

- **Maine:** *Order, Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, 2005 Me. PUC LEXIS 267, at *28-*29 (Me. PUC Sept. 13, 2005) (“As stated earlier, the FCC has determined that the appropriate pricing standard for Section 271 UNEs is ‘just and reasonable’ and we have determined that until Verizon files prices for our approval or submits FCC-approved rates, Verizon must continue to provision all Section 271 UNEs at TELRIC prices.”), available at http://mpuc.informe.org/easyfile/cache/easyfile_doc169297.DOC, *preliminary injunction denied in Verizon New England Inc. d/b/a Verizon Maine v. Maine Public Utilities Commission*, 403 F. Supp. 2d 96, 102 (D. Me. 2005) (“[T]he authority of state commissions over rate-making and its applicable standards is not pre-empted by the express or implied content of § 271. Furthermore, Verizon has failed to direct the Court to any order of the FCC interpreting § 271 to provide an exclusive grant of authority for rate-making under § 271.”).
- **Michigan:** *Order, In the matter, on the Commission's own motion, to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by SBC MICHIGAN and VERIZON*, Case No. U-14447, at 16 (Mich. PSC Sept. 20, 2005) (“The Commission is still convinced that obligations under Section 271 should be included in interconnection agreements approved pursuant to Section 252. However, the Joint CLECs must negotiate with SBC concerning terms and conditions, seeking Commission arbitration if necessary. If the CLECs experience problems with obtaining items available pursuant to Section 271, they may take appropriate enforcement action.”).
- **Minnesota:** *In the Matter of a Potential Proceeding to Investigate the Wholesale Rates Charged by Qwest*, Docket p-421/CI-05-1996, Notice and Order for Hearing, at 3 (Minn. P.U.C. May 4, 2006). *But see* Minnesota: Arbitrator’s Report, *Petition of DIECA Communications, Inc. d/b/a Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement With Qwest Corporation*, MPUC Docket No. P-5692, 421/IC-04-549, OAH Docket No. 3-2500-15908-4, at 15 (Minn. PUC Dec. 15, 2004) (“There is no legal authority in the Act, the TRO, or in state law that would require the inclusion of section 271 terms in the interconnection agreement over Qwest’s objection.”).

- New Hampshire: Order No. 24,598, Order Classifying Wire Centers and Addressing Related Matters, *Verizon New Hampshire Wire Center Investigation*, DT 05-083 (March 10, 2006), at 45-46 (holding that Verizon must offer certain 271 network elements at FCC transition rates until such time as new rates are established and approved by the NHPSC, and relying on Order No. 24,442, *Proposed Revisions to Tariff NHPUC No. 84 (Statement of Generally Available Terms and Conditions)*, *Petition for Declaratory Order re Line Sharing*, DT 03-201, DT 04-176 (March 11, 2005), at 49-50 (“We are continuing our oversight of Verizon’s section 271 obligations. . . . we do not foreclose the possibility that Verizon may turn to the FCC regarding rates but we conclude that, unless or until the FCC acts, pricing is an area of concurrent jurisdiction and an example of cooperative federalism. Accordingly, as a state agency and being closest to the issues, if and when Verizon files changes to rates [for Section 271 network elements], we will review such proposed changes in the normal course.”)), available at <http://www.puc.state.nh.us/Regulatory/Orders/2006orders/24598t.pdf> and <http://www.puc.state.nh.us/Regulatory/Orders/2005orders/24442t.pdf>.
- Oklahoma: *Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P. d/b/a SBC Oklahoma under Section 252(B)(1) of The Telecommunications Act of 1996*, Cause No. PUD 200400497, Written Report of the Arbitrator at 199 (Okla. Corp. Comm. May 2005); Final Order, at 9 (June 1, 2005). *But see* Final Order on Motions for Clarification and Reconsideration of Order No. 522119, *Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P. d/b/a SBC Oklahoma Under Section 252(b)(1) of the Telecommunications Act of 1996*, Cause Nos. PUD 200400497, 200400496, Order No. 523439, 2006 Okla. PUC LEXIS 56, at *3 (Okla. Corp. Comm’n April 18, 2006) (“2. 271 Related Elements. The Commission decision is reaffirmed. This Commission finds that it is not necessary to determine whether the Commission has jurisdiction over Section 271 elements because Section 271 elements are not included within the ICA. 3. TELRIC Rates for Section 271 Services. The Commission decision is reaffirmed. This Commission finds that it is not necessary to determine whether the Commission has jurisdiction over the pricing of Section 271 elements because Section 271 elements are not included within the ICA.”).

- Tennessee: Final Order of Arbitration Award, *Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 03-00119, 2005 Tenn. PUC LEXIS 332, at *60 (Tennessee Reg. Auth. Oct. 20, 2005) (“Further, there is no language contained in the Federal Act that expressly prohibits state jurisdiction over Section 271 elements that are included in issues required to be arbitrated pursuant to Section 252. Rather, there is language that indicates that Congress gave states a role in determining Section 271 elements through state approval of both SGAT conditions and interconnection agreements.”), available at <http://www.state.tn.us/tra/orders/2003/0300119db.pdf>. *But see* Excerpt of Transcript of Authority Conference, Docket 04-00046, at 21-22 (Tenn. Reg. Auth. March 6, 2006) (voting to “acknowledge that BellSouth and the CLECs are free to negotiate commingling a Section 251 element with a Section 271 element but provision of a Section 251-271 commingling service by BellSouth is voluntary”).